

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 MAURICE HARPER,
12
13 Petitioner,
14
15 v.
16 W.J. SULLIVAN, Warden,
17
18 Respondent.

Case No. 2:19-cv-00944-FMO (AFM)

**ORDER DISMISSING PETITION
WITHOUTH PREJUDICE AND
WITH LEAVE TO AMEND**

19 On February 7, 2019, Petitioner, a state prisoner, filed a document entitled
20 “Stay and Abeyance Request.” Petitioner seeks an order staying “this action” until
21 he exhausts his state remedies. Liberally construing the request as a petition for a writ
22 of habeas corpus pursuant to 28 U.S.C. § 2254, it is subject to summary dismissal.
23 *See* Rule 4 of the Rules Governing Section 2254 Cases.

DISCUSSION

24 To begin with, the petition fails to satisfy Rule 2(c) of the Rules Governing
25 Section 2254 Cases, which requires that a petition for a writ of habeas corpus “specify
26 all the grounds for relief which are available to the petitioner” and “state the facts
27 supporting each ground.” The petition, however, fails to set forth any grounds for
28 relief.

1 Furthermore, a state prisoner is required to exhaust all available state court
2 remedies before a federal court may grant habeas relief. *See* 28 U.S.C. § 2254(b);
3 *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To satisfy the exhaustion
4 requirement, a petitioner must fairly present both the factual and the federal legal
5 basis for his claims to the highest state court. *O'Sullivan*, 526 U.S. at 845; *see Wood*
6 *v. Ryan*, 693 F.3d 1104, 1119–1120 (9th Cir. 2012) (“To fairly present a claim in
7 state court, a petitioner must describe the operative facts supporting that claim.”). It
8 is clear from the face of the petition, as well as from a review of the official docket
9 of the California Supreme Court, that Petitioner has never filed any petition in the
10 highest state court. *See* <http://appellatecases.courtinfo.ca.gov>. Because Petitioner has
11 not exhausted his state remedies with respect to any claim, the petition is subject to
12 dismissal. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982).

13 Recognizing this failure, Petitioner seeks a stay pursuant to *Rhines v. Weber*,
14 544 U.S. 269 (2005). In limited circumstance, a district court may stay a mixed
15 petition and hold it in abeyance while the petitioner returns to state court to exhaust
16 his unexhausted claim. *Rhines*, 544 U.S. at 277.¹ Pursuant to *Rhines*, a petitioner may
17 be entitled to a stay while he exhausts his state remedies if: (a) the petitioner shows
18 good cause for his failure to exhaust his claims first in state court; (b) the unexhausted
19 claims are not “plainly meritless”; and (c) the petitioner has not engaged in “abusive
20 litigation tactics or intentional delay.” *See Rhines*, 544 U.S. at 277-278.

21 Petitioner has not made the requisite showing. Petitioner provides no
22 explanation for his failure to present his claims to the California Supreme Court prior
23 to filing this federal petition. In addition, because he has not set forth any claims for
24 relief, the Court cannot determine whether his proposed unexhausted claims are
25 plainly meritless. Finally, in the circumstances of this case, it is not evident that a
26 *Rhines* stay is necessary. The AEDPA’s statute of limitation begins to run from the

27 ¹ The Ninth Circuit has held that *Rhines* also applies to petitions that contain only unexhausted
28 claims. *See Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016).

1 date on which the judgment becomes final by the conclusion of direct review or the
2 expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). The
3 California Court of Appeal affirmed Petitioner’s conviction on September 18, 2018.
4 Because it does not appear that Petitioner filed a petition for review, his conviction
5 became final forty days later – that is, on October 28, 2018. *See* Cal. Rules Ct.
6 8.366(b)(1) & 8.500(e)(1); *Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008).
7 Consequently, it appears that Petitioner has to October 28, 2019 within which to file
8 a federal petition.²

9 ORDER

10 For the foregoing reasons, the petition is dismissed with leave to amend. If
11 Petitioner still desires to pursue this action, he is **ORDERED** to file a First Amended
12 Petition on the forms provided by the Clerk within twenty-eight (28) days of the date
13 of this Order. The clerk is directed to send Petitioner a blank Central District § 2254
14 habeas petition form for this purpose.

15 The amended petition should reflect the same case number, be clearly labeled
16 “First Amended Petition,” be filled out completely, and be signed and dated. The
17 First Amended Petition must include the specific legal and factual basis for each of
18 Petitioner’s claims for relief, as well as indicate whether each of those claims has
19 been presented to the California Supreme Court. The First Amended Petition may
20 include an attachment that is limited to 25 pages. If Petitioner seeks to file an
21 attachment in excess of this page limitation, he must request permission to do so from
22 the Court in advance.

23 If Petitioner seeks to raise any unexhausted claim(s) in the First Amended
24 Petition and believes that he can make the requisite showing for a stay of this action,
25 then he may file, concurrently with his First Amended Petition, a separate motion to
26 hold the First Amended Petition in abeyance while he returns to state court to exhaust

27 ² Nothing in this order should be construed as an opinion as to the timeliness of any future
28 petition.

1 his state court remedies with respect to his unexhausted claim(s).

2 **Petitioner is cautioned that failure to timely file a First Amended Petition**
3 **in compliance with this Order may result in dismissal of this action without**
4 **prejudice.**

5 Alternatively, petitioner may file a request voluntary dismissal of this action
6 pursuant to Federal Rule of Civil Procedure 41(a). The Clerk shall mail petitioner a
7 copy of the Notice of Dismissal form along with this order.

8 **It is so ordered.**

9
10 DATED: 2/20/2019



ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE